Supreme Court of the United States

October Term, 1962

No. 150

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY and MUNICIPAL SECURITIES COMPANY, INC.,

Petitioners,

v.

NEW YORK STOCK EXCHANGE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the Court of Appeals is reported at 302 F. 2d 714. The opinion of the District Court is reported at 196 F. Supp. 209 (S. D. N. Y. 1961).

Jurisdiction

The judgment of the court below was entered on April 6, 1962 (R. 272). A petition for a writ of certiorari was filed on May 31, 1962, and was granted on October 8, 1962 (R. 273). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statement of Questions Presented

1. Do the provisions of Sections 6 and 19(b) of the Securities Exchange Act of 1934, 48 Stat. 885, 898, 15 U. S. C. §§ 78f and 78s(b), immunize from the antitrust laws those provisions of the constitution and rules of a registered securities exchange by which said exchange is authorized to arbitrarily restrain the exercise of a member firm's freedom to establish and maintain private wire connections with non-members for the purpose of trading and communicating with respect to transactions in securities not listed for trading on said exchange?

2. Do the provisions of Section 6 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U. S. C. § 78f, which require a securities exchange to make and enforce rules against members who engage in conduct inconsistent with just and equitable principles of trade and wilful violation of provisions of the Securities Exchange Act, immunize from the antitrust laws exchange action not directed against the derelictions of members, but against non-member over-the-counter securities dealers?

3. Assuming, *arguendo,* that a registered securities exchange is immune from the antitrust laws for action taken in accordance with its rules filed under Section 6 of the Securities Exchange Act of 1934, does such immunity extend to arbitrary or unreasonable exchange action requiring exchange members to cease maintaining private wire connections with non-members?

Statutory Provisions Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1 and 2; Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26; and Sections 6 and 19(b) of the Securities

Exchange Act of 1934, 48 Stat. 885, 898, 15 U. S. C. §§ 78f and 78s(b).

The pertinent portions of these statutes are set forth in Appendix A *infra,* at pp. 33-36.

Statement of the Case

The District Court made extensive findings with respect to those facts about which no genuine dispute existed (R. 204-211, 229-233). These findings were left undisturbed by the Court of Appeals (R. 257-268).

A. Parties and Cause of Action

Petitioner Harold J. Silver, d/b/a Municipal Securities Company (hereinafter referred to as "MSC"), is a sole proprietorship engaged in the securities business. Virtually all of its activities are concerned with municipal bond transactions. Petitioner Municipal Securities Company, Inc. (hereinafter referred to as "MSC, INC."), a corporation organized under the laws of Texas, also engaged in the securities business, principally in over-the-counter securities. Petitioners MSC and MSC, INC. were licensed as securities dealers under the laws of Texas, were registered broker-dealers with the Securities and Exchange Commission (SEC), and were members in good standing of the National Association of Securities Dealers (NASD) (R. 17-18, 20, 24). Petitioners were not members of the New York Stock Exchange (R. 204).

Respondent New York Stock Exchange (hereinafter referred to as "NYSE" or the "Exchange") is an unincorporated association with an authorized membership of 1375. It provides facilities for its members and their firms to transact business in corporate securities listed for trading by the Exchange. While actual trading takes place

on the exchange floor in New York, its members do business nationwide. It is the largest and most important of the national stock exchanges (R. 18, 94, 205).[1]

The complaint alleges, *inter alia,* a conspiracy between the NYSE and various of its member firms (named as co-conspirators, but not as parties) to deprive petitioners of private wire and telemeter connections with such member firms and of the NYSE's stock ticker service, all to petitioners' competitive disadvantage in violation of the Sherman Act, 15 U. S. C. § 1, *et seq.* (R. 1, 203).

B. Private Wire Connections and Stock Ticker Service

In September 1956, MSC installed direct private telephone wires to the municipal bond departments of two NYSE member firms, one non-member firm and three Dallas banks (R. 22-23). In May 1958, an additional direct wire was installed between MSC's office and the office of the Dallas Union Securities Company which later became a NYSE member (R. 23). Approval by the NYSE of the private wire connections between MSC and the Exchange's member firms was neither requested nor granted (R. 42, 125). MSC utilized these private wire connections solely to obtain quotations and transact business in "municipal securities, municipal bonds and unlisted securities" (R. 155).

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[1] The District Court found: "The [NYSE] lists select corporate securities which include those of many of the country's largest and most important corporations. It provides a quality market for its members to execute orders for the purchase and sale of securities so listed for their own accounts and for the accounts of customers. The Exchange also lists a few select municipal bonds. The market price for a listed security is established by auction on the floor of the Exchange. Market prices are in a constant state of flux, many of them rapidly changing from moment to moment. The market is extremely sensitive to variations in price, even slight fluctuations causing spurts of buying and selling." (R. 205).

On June 23, 1958, MSC, INC. mailed to the NYSE an "Agreement for Continuous Quotations of the New York Stock Exchange," *i.e.*, stock ticker service (R. 57). On June 25, 1958, the NYSE advised MSC, INC. that its "application for continuous stock quotation service has been temporarily approved, pending further processing" (R. 61), and actual installation of the "ticker" was made on July 8, 1958 (R. 25, 39). MSC, INC. utilized the continuous stock quotation (ticker) service to keep "abreast of movements and trends in security prices generally" (R. 40) and "as a customer accommodation" (R. 26).[2]

Prior thereto, and on June 13, 1958, MSC, INC. had requested the NYSE to approve the installation of private wire connections between its office and the Dallas offices of nine NYSE member firms (R. 50). This was done on a NYSE form entitled "Application for Private Wire Connection" (R. 47). At the same time, MSC, INC. sent the NYSE a form entitled "Information to be Furnished by Non-Member for Private Wire Connections or Ticker Service" (R. 51). Temporary approval was granted by the NYSE at various times during the period June 18, 1958 through August 13, 1958 and the wires were installed (R. 25). MSC, INC. utilized these private wire connec-

[2] The District Court found: "The prices of securities listed by the Exchange and traded in on its floor are supplied by continuous stock quotation service which goes by ticker to member firms, to many non-member broker-dealers and to various other places where such quotations are of interest. The ticker provides up to the minute quotations of the prices at which listed securities are being currently traded on the floor of the Exchange. The service is carried over the facilities of the Western Union Telegraph Company and is for purposes of information only." (R. 205).

tions primarily to obtain quotations and transact business in over-the-counter securities (R. 26-27, 40-41).[3]

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[3] The District Court found:

"A large number of securities are not listed either on the New York Stock Exchange or on the other national exchanges. These securities are dealt in on the so-called over-the-counter market and are known as over-the-counter securities. The market price for over-the-counter securities is established by traders at their desks in the numerous firms dealing in securities throughout the country. Such traders are in constant communication with their counterparts in other firms seeking buyers or sellers in particular securities at the best price available. There is no central trading place for over-the-counter securities. The market in them is established by the offers to buy and sell which are communicated between traders. Thus the supply and demand of the over-the-counter market establishes the going bid and asked prices for any particular security at any particular moment of the trading day (R. 205-206).

"Extensive communication networks facilitate trading in securities. The principal medium which firms engaged in the securities business use to communicate with one another is the private wire connection. This is a direct telephone wire over which traders may instantly communicate with one another to exchange information and transact business. A trader in one firm can establish contact with a trader in another simply by flipping a switch (R. 206).

"Depending on the number of wire connections a firm may have, a single trader in over-the-counter securities can, by using different switches on a board before him, make offers to buy or sell and obtain offers from a variety of other firms within a matter of seconds. These are direct circuits and no dialing or waiting is necessary. Thus traders have the ease and speed of immediate and direct communication. Similar communication is also carried on by direct telemeter or teletype and, in addition, some business is transacted by the more usual means of business communication (R. 206).

"While many dealers in over-the-counter securities are not members of the Exchange many of the member firms and corporations, including these involved here, do an extensive business in over-the-counter securities and in unlisted municipal bonds. Private wire connections between over-the-counter securities dealers, who are not members of the Exchange, and member firms, facilitate transactions between them in unlisted securities and municipals, and also provide facilities by which customers of non-member firms who desire to purchase or sell listed securities can have their orders transmitted to member firms for rapid execution." (R. 206).

C. The Withdrawal of Private Wire Connections and Stock Ticker Service

On February 12, 1959, without notice to MSC or MSC, INC., a staff meeting of the NYSE's Department of Member Firms was held in New York City. At that meeting, MSC, INC.'s applications for private wire connections (R. 47) and continuous stock quotation service (R. 57) were disapproved (R. 28). On the same day, the NYSE instructed its member firms to discontinue their private wire connections with MSC, INC. (R. 28). By March 2, 1959, all private wire connections between MSC and MSC, INC. on the one hand, and NYSE member firms on the other, were discontinued (R. 29-30, 42-43, 93).

On February 16, 1959, MSC, INC. received a letter from the NYSE advising that its temporary approval of the stock ticker service had been withdrawn and that service would be discontinued as of February 18, 1959 (R. 70). Thereafter, petitioners addressed a letter to both the president and chairman of the NYSE's Board of Governors, requesting (1) temporary reinstatement of the services; (2) the reasons for the action of the New York Stock Exchange; and (3) an opportunity to answer any charges and present whatever information that might be required (R. 71-72). All of these requests "were met with categorical refusal" (R. 74, 75, 210).

D. The Reasons for the NYSE's Action

Petitioners were given no reason for the Exchange's action prior to the commencement of suit (R. 210-211, 214). Later, on petitioners' motion for summary judgment (R. 15), the Exchange asserted that it took the action it did because (1) its investigation had turned up "scurrilous matter with respect to the Silvers";[4] (2) the Silvers had

[4] The nature of this information has never been disclosed to petitioners, petitioners' counsel, or even the courts below (R. 214-215, 229-230).

sold certain shares of the U. S. Hoffman Machinery Corporation in 1955, two months after acquiring them, although at the time of the acquisition they had stated in writing that they had "no present intention" of selling them; (3) MSC, INC.'s application for private wire connections and stock ticker service had omitted from a long list of corporate connections covering a ten year period the names of two corporations with which Silver had been connected; and (4) in 1953, some six years prior to the NYSE's action, the Defense Department had suspended the "security clearance" of a corporation (not one of those omitted from MSC, INC.'s application) in which the Silvers were principal officers (R. 214-215).

The District Court found that (1) the "record fails to substantiate these charges against the Silvers" (R. 229-233) and (2) "the conduct of the Exchange [could not] be justified by the denial of security clearance * * *, nor by any of the other facts and circumstances upon which it relied" (R. 232). The Assistant Director of the NYSE's Department of Member Firms "expressly stated that the action of the Exchange was not based on any criminal conviction of either of the Silvers, or on any false or misleading statements made by them to the SEC in any application for the registration of securities, or on any specific matters regarding securities transactions other than the alleged transactions in U. S. Hoffman stock" (R. 232-233). With respect to the U. S. Hoffman stock transactions, the District Court found: "The SEC was fully apprised of these transactions and acquiesced in the sale without the need for a registration certificate. The material submitted to the SEC in justification of the sale, which is uncontroverted by the Exchange, demonstrates that the Silvers did not act in bad faith either in the statements made at the time of the acquisition or in making the sales" (R. 230).

The District Court's "inescapable conclusion from what [was] relied on by the Exchange in justification [was] that

[the Exchange] acted arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (R. 233).[5]

E. Proceedings Below

Petitioners commenced this action on April 3, 1959 by filing a complaint in the United States District Court for the Southern District of New York (R. 1). Jurisdiction was based on diversity of citizenship and the Federal antitrust laws (R. 2). After answer (R. 13) and extensive discovery by both sides (R. 214), petitioners moved for partial summary judgment (R. 15). Petitioners' motion was granted on May 19, 1961 (R. 201) and, on June 18, 1961, the District Court filed a written opinion containing its findings of fact and conclusions of law (R. 203).

The District Court entered an order granting petitioners a permanent injunction under Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26 (R. 239-240). Respondent filed a notice of appeal on August 31, 1961 (R. 241). On April 6, 1962, the Court of Appeals reversed the action of the District Court by a 2 to 1 vote (R. 256). Judge Waterman, dissenting, stated: "I would affirm on the opinion of Judge Bryan below, reported at 196 F. Supp. 209 (S. D. N. Y., 1961)" (R. 268).

Summary of Argument

The antitrust immunity issues which this Court is asked for the first time to decide, arise from Section 6 of the Securities Exchange Act of 1934, 15 U. S. C. § 78f, which

[5] The Court of Appeals did not disturb this finding. It said: "Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary" (R. 267).

requires, *inter alia,* a registered securities exchange to make and enforce rules for the discipline of its *members* for conduct inconsistent with "just and equitable principles of trade" and the willful violation of any provisions of the Act or any rule or regulation thereunder. Or, to paraphrase the opinion of Judge Bryan in the District Court:

> "* * * [whether] the provisions of the [Securities Exchange] Act requiring an Exchange to file its constitution and rules and to register are * * * a substitute for [or] supersede the antitrust laws." (R. 222)

On all the questions below, the Court of Appeals was divided. Petitioners contend with Judge Waterman (R. 268-271), that the majority erred. Petitioners' challenge is based on the proposition that Congress did not entrust national securities exchanges with general regulatory control over all phases of the securities business and, insofar as any rules required to be filed by a national securities exchange (1) attempt to regulate non-members in the over-the-counter market or (2) authorize arbitrary action, there is no repugnancy between the provisions of the Securities Exchange Act and the antitrust laws.

I

The pertinent provisions of the NYSE's constitution and rules, as here applied, covered private wire connections between members and non-members utilized for trading in securities *not* listed for trading on the Exchange. The District Court held that they purported "to confer upon the Exchange an absolute power to approve or disapprove all wire connections * * * with non-member firms and to require that such connections * * * be discontinued in its absolute and uncontrolled discretion" (R. 209). These provisions of the NYSE's constitution and rules were therefore in violation of the Sherman Act, unless exempted

by reason of the Securities Exchange Act. *Associated Press* v. *United States,* 326 U. S. 1 (1945).

The action of the NYSE's member-firms—taken in accordance with the Exchange's constitution and rules—was a concerted refusal to deal on the same terms and conditions as NYSE member-firms were willing to deal with one another and with non-members other than petitioners. Accordingly, the NYSE's action ran afoul of the Sherman Act. For, as the District Court pointed out: "An offer to deal only under discriminatory terms or conditions is just as violative of the Sherman Act and its purposes as a refusal to deal altogether." (R. 227). The law is clear. Unless the NYSE is immunized from the antitrust laws by reason of its statutory obligations under the Securities Exchange Act, its action in this case was illegal *per se. Fashion Originators' Guild* v. *FTC,* 312 U. S. 457 (1941); *Klor's, Inc.* v. *Broadway-Hale Stores,* 359 U. S. 207 (1959).

II

The Securities Exchange Act provides no explicit antitrust immunity for actions taken by registered exchanges. Under settled principles no such immunity will be implied unless there is a clear repugnancy between the Act and the antitrust laws, and then only *pro tanto* to the extent of the repugnancy. *E.g., Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 457 (1945). In this case, no such repugnancy exists.

Section 6(b) of the Securities Exchange Act, which *requires* the NYSE to make and enforce rules for the discipline of its *members* for conduct "inconsistent with just and equitable principles of trade" and the willful violation of any provisions of the Act, provides no antitrust immunity for exchange action directed, not against the derelictions of members, but against non-members who maintain private wire connections with members. In the

instant case, the NYSE's action was directed, not against illegal or unethical member conduct, but against non-members believed to be "untrustworthy persons of * * * doubtful character" (R. 229). The District Court correctly held that so long as Exchange "members do not indulge in conduct which is illegal or inconsistent with just and equitable principles of trade, [the NYSE] has neither the power nor the authority to determine with whom its members may or may not deal * * *." (R. 223-224).

Section 6(c) of the Securities Exchange Act, which permits the NYSE to adopt and enforce any rule not inconsistent with the Act and the SEC's rules and regulations thereunder, must be read together with Section 19(b). That section authorizes the SEC to supplement or alter an exchange's rules "in respect of such matters as * * * (8) *the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange* * * *". 15 U. S. C. § 78s(b).

The majority below held that the NYSE's rule against non-approved wire connections was immunized from the antitrust laws because "it is reasonably to be presumed that [that rule has] the approval of the Commission since it has not taken the action which it is empowered to take [under section 19(b)] to bring about [its] amendment" (R. 264). This holding was clearly wrong. Section 19(b) does not authorize the SEC to alter or amend an exchange rule with respect to private wire connections between members and non-members utilized for trading in securities *not* listed for trading on such exchange. 15 U. S. C. § 78s (b)(8). Assuming, *arguendo,* that it does, nothing in either the Securities Exchange Act or its legislative history reveals that the SEC was given power to decide antitrust issues as such, or that SEC inaction was intended to prevent enforcement of the antitrust laws in the courts. Moreover, the SEC did not approve "the particular exchange rules here involved" and, in any event, the SEC "has no

authority to review action taken by an exchange in applying its rules."

The holding of the District Court that the provisions of the Securities Exchange Act "requiring an exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the antitrust laws" (R. 222) was correct. *E.g., United States* v. *Radio Corporation of America,* 358 U. S. 334, 346 (1959); *California* v. *Federal Power Commission,* 369 U. S. 482, 485 (1962); *United States* v. *Borden Co.,* 308 U. S. 188, 198 (1939).

III

Assuming, *arguendo,* that the NYSE was immune from the antitrust laws for action taken in accordance with its rules filed under Section 6 of the Securities Exchange Act, it is nonetheless clear that Congress provided no immunity for arbitrary or unreasonable Exchange action. The District Court found that the NYSE "acted arbitrarily and unreasonably" (R. 233) and the Court of Appeals did not disturb that finding.

Regulated industries are not *per se* exempt from the Sherman Act. *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 456-457 (1945). If a statutory exemption is provided, it is strictly construed. In such cases, the exemption is granted only insofar as necessary to effect the legislative purpose. For example, in *United States* v. *Borden Co.,* 308 U. S. 188 (1939) and *Milk Producers Association* v. *United States,* 362 U. S. 458 (1960), "this Court could not assume that Congress having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." *California* v. *Federal Power Commission,* 369 U. S. 482, 485 (1962). There is no exemption in the Securities Exchange Act itself. Yet the majority below assumed that Congress granted, not a limited exemption from the anti-trust laws, but "an overall inclusive

one." The majority below, fearing that liability under the Sherman Act, but not under some other law, "would go far toward defeating the statutory policy of self-regulation" (R. 266), held that Exchange action, even if arbitrary, was impliedly immune. We think it plain, and not open to serious question, that "[i]mmunity from the antitrust laws is not [so] lightly implied." *California v. Federal Power Commission, supra.*

ARGUMENT

Introduction

In its order granting petitioners partial summary judgment, the District Court permanently enjoined the NYSE from preventing the establishment and operation of private wire connections between MSC and MSC, INC. on the one hand, and NYSE member firms on the other (R. 240). The order in no way limited the NYSE's control over its own "quotations" and was restricted to private wire connections maintained and operated "for the purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange" (R. 240).

Once it is recognized that the District Court's order was limited to private wire connections utilized to carry on an over-the-counter securities business, the major issue of this case assumes its proper focus, *i.e.,* whether the NYSE's obligation under Section 6 of the Securities Exchange Act to make and enforce rules for the discipline of its *members* for conduct "inconsistent with just and equitable principles of trade" superseded the antitrust laws in the circumstances of this case. That issue was resolved by the District Court, as follows:

> "*Providing that its members do not indulge in conduct which is illegal or inconsistent with just*

> *and equitable principles of trade,* an exchange has neither the power nor the authority to determine with whom its members may or may not deal or to direct them to desist from dealing with non-member broker/dealers engaged in transactions in over-the-counter securities and municipals. If it does so it does so at its peril and is subject to such appropriate action as may be taken under the antitrust laws." (R. 223-224).[6]

The District Court was clearly right.

I

Unless Otherwise Immune, the NYSE's Action Violated the Sherman Act

Since the "over-the-counter market is a negotiated market in which, for the most part, *dealers* acting as principals buy from and sell to investors or other dealers at an undisclosed profit * * *,"[7] perhaps the most important tool of a dealer in this market is his communications system, *i.e.*, his means of obtaining and publishing quotations for those securities not traded on the Exchange (R. 26, 84, 114-119). And for the securities dealer actively engaged in over-the-counter trading, private wire connections with other over-the-counter dealers are essential to a rapid gathering and dissemination of these quotations (R. 206). "Fast communications are important facilities * * * because it is over these [wires] that the great bulk of the buying and selling of securities are transacted." Loeser, *The Over-*

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[6] Emphasis supplied.

[7] 2 Loss, *Securities Regulation*, 1277 (1961). This is to be contrasted with the exchange markets, *i.e.*, "auction markets where the orders of buyers and sellers are concentrated for the purpose of offering transactions through the meeting of the highest bid and the lowest offer," the exchange members acting as brokers for a disclosed commission. *Ibid.*

The-Counter Securities Market, 32 (1940). Professor Loss points out:

> "The over-the-counter market knows no ticker, nor is there any other public record of actual transactions. Bid and asked quotations for particular securities are circulated by those dealers who are interested in making a market for them. And a given dealer may circulate two sets of quotations—'an "inside" market at which he indicates interest in buying from or selling to other dealers, and an "outside" market, within the range of which he indicates an interest in buying from or selling to a member of the public.'
>
> * * *
>
> "Despite these differences from the exchange markets, the over-the-counter market has an organization and behavior patterns which, while more subtle, are no less real. The principal over-the-counter firms are inter-connected by an intricate, nationwide wire system which tends to keep bids and offers more or less in line—and is sufficiently effective, as any over-the-counter firm will attest, for a New York rumor to be repeated in San Francisco almost in a matter of seconds. Indeed, it has been suggested that 'over-the-telephone' might be a more accurate description of the market than 'over-the-counter.' The various firms know from the [National Quotation Bureau] sheets and otherwise who the specialists are in particular securities, and they are continually chattering and trading back and forth over their direct telephone and teletype wires. There are no 'seats' in the over-the-counter market and no experience or education qualifications. All that is necessary is state and SEC registration in most cases—supplemented * * * by a degree of self-regulation by the NASD, to which most of the principal broker-dealers belong. The over-the-counter broker-dealers vary from a First Boston Corporation —which does more volume than some of the smaller stock exchanges—to the one-man shop in the 'sticks' whose owner perhaps supplements his real estate and insurance business by selling securities on the side. ***Many of the principal firms also hold seats, or***

> *have members who do, on the various exchanges, and many firms which are thought of primarily as exchange firms do a substantial business over the counter.*"[8] (Emphasis supplied.)

The percentage of over-the-counter corporate securities trading transactions performed by NYSE member firms is unknown. Undoubtedly, however, it represents a substantial portion of the total. 2 Loss, *Securities Regulation*, 1283, ftn. 20 (1961). Thus, when the NYSE prohibits its member firms from maintaining private wire connections with a non-member who is an over-the-counter securities trader, the *effect* of its action may be tantamount to excluding that trader from a substantial part of the over-the-counter securities market (R. 40-41, 43-44, 76, 206, 226).

A. The NYSE's Constitution and Rules

Article III, section 6 of the NYSE Constitution[9] provides that the Board of Governors of the Exchange:

> "Shall have power to approve or disapprove any application for ticker service to any non-member, or any wire, wireless or other connection between any office of the Exchange, member firm and any non-member, and may require the discontinuance of any such service or connection." (R. 194-195).

Rule 355 of the NYSE's Rules provides:

> "(a) No member or member organization shall establish or maintain any wire connection, private radio, television or wireless system between his or its offices and the office of any non-member, or permit any private radio or television system between his or its offices, without prior consent of the Exchange.
>
> "(b) Every non-member will be required to execute a private wire contract in form prescribed by

[8] *Op. cit., supra*, ftn. 7, at pp. 1278-1283.

[9] NYSE Constitution and Rules, C. C. H. Ed. (1959).

the Exchange to be filed with it, unless a contract is already on file with the Exchange.

"(c) Notification regarding a private means of communication with a non-member and the signed contract when necessary shall be submitted to the Department of Member Firms. This notification, by a member or allied member, may be in form supplied by the Exchange or in a letter form, and shall include the essential facts concerning the non-member and the means of communication.

"(d) Each member or member organization shall submit annually to the Department of Member Firms a list of all non-members with whom private means of communication are maintained.

"(e) The Exchange may require at any time that any means of communication be discontinued." (R. 196-197).

Rule 356 of the NYSE's Rules provides:

"The Exchange may require at any time the discontinuance of any means of communication whatsoever which has a terminus in the office of a member or member organization." (R. 197).

Rule 358, para. 2358.13 of the Rules provides:

"Prohibited Wire Connections.—No member, allied member or member organization may utilize any private or public wire connection or any other means of communication whatsoever to transmit any business directly or indirectly with or for:

"(1) Any illicit or illegal organization;

"(2) any organization, firm or individual making a practice of dealing on differences in market quotations; or

"(3) any organization, firm or individual engaged in purchasing or selling securities for customers and making a practice of taking the side of the market opposite to the side taken by the customers." (R. 198).

These provisions of the NYSE's constitution and rules apply to private wire connections between members and non-members which are used not only for "reporting transactions of listed securities," but also for trading, and communicating with respect to, over-the-counter (unlisted) securities. See Rule 358, para. 2358.10 (R. 197). If any doubt remains, the deposition of the Assistant Director of the NYSE's Department of Member Firms removes it (R. 180, 186, 193-194).

This was the practical interpretation of Rule 355(a) made by the NYSE in this very case. The Court will note that MSC had private wire connections with the municipal bond departments of three NYSE member firms in Dallas. These wires were used solely in connection with obtaining quotations and transacting business with respect to "municipal securities, municipal bonds and unlisted securities" (R. 155). Yet, despite the fact that the NYSE "does not furnish quotations in connection with municipal securities or unlisted stocks" (R. 155) and that none of these member firms had sought NYSE approval prior to installing these "municipal bond" wires (R. 42), respondent conceded (R. 93) that it construed its action of February 12, 1959 to apply to such connections as well (R. 42-43).

The coercive effect of the NYSE's constitution and rules [10] upon a member firm's right of independent action is demonstrated by Exhibits 17 through 25C (R. 63-66), Exhibits 27 through 33 (R. 69), and the deposition of Walter Coleman, Assistant Director of the NYSE's Department of Member Firms. According to Mr. Coleman, no member firm had ever failed (during the seven to eight-year period of his recollection) to discontinue a private wire connection with a non-member after having been instructed by the NYSE to do so (R. 181-182).

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[10] See particularly, NYSE Constitution, Art. XIV, Sections 6 and 10 (R. 195).

The foregoing makes clear that the NYSE's rule against non-approved wire connections [11] is a device through which the NYSE restrains member firms from establishing and maintaining private wire connections with non-members, thereby excluding such non-members from a substantial part of the over-the-counter securities market. Indeed, the anti-competitive effect of this rule was a matter of congressional knowledge as early as 1913. *H. R. Rep. No. 1593*, 62d Cong., 3d Sess., 34-35 (1913). The District Court held that it purported "to confer upon the Exchange an absolute power to approve or disapprove all wire connections * * * with non-member firms and to require that such connections * * * be discontinued in its absolute and uncontrolled discretion" (R. 209). It therefore violated the Sherman Act, unless it was otherwise exempted. *Associated Press* v. *United States*, 326 U. S. 1 (1945); *Anderson* v. *Ship Owners' Association of Pacific Coast*, 272 U. S. 359, 364-365 (1926); *Montague & Co.* v. *Lowry*, 193 U. S. 38, 46-47 (1904).

B. The Concerted Refusal to Deal

By March 2, 1959—and as a result of the NYSE's directive—all private wire connections between MSC and MSC, INC. on the one hand, and NYSE member-firms on the other, were discontinued (R. 29). Such action was not an *absolute* refusal to deal.[12] It was, instead, a concerted refusal to deal on the same terms and conditions as NYSE member-firms were willing to deal with one another and

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[11] NYSE Constitution, Art. III, Section 6; Rules 355 and 356, and Rule 358, para. 2358.13 (R. 194-198).

[12] In fact, after MSC, INC.'s private wire connections to the NYSE's member firms had been discontinued, communications were made by conventional means, *i.e.*, telephone. This method took an average time period measureable in minutes (rather than seconds as in the case of a private wire), the time differential placing MSC, INC. at a serious competitive disadvantage so far as its over-the-counter trading activities were concerned (R. 33-34, 43-44).

with non-members other than MSC and MSC, INC. (R. 65, 226). Accordingly, the NYSE's action ran afoul of the Sherman Act. For, as the District Court pointed out: "An offer to deal only under discriminatory terms or conditions is just as violative of the Sherman Act and its purposes as a refusal to deal altogether" (R. 227).[13] Each such concerted refusal to deal is illegal *per se*. *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U. S. 207, 209 (1959); *Radiant Burners* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961).

Professor Handler points out:

> "The interesting effort to discriminate between the justifiable and unjustifiable boycott has now been halted—both are unqualifiedly proscribed. It will, of course, come as no surprise to students of antitrust that group boycotts should be held to be *per se* unlawful. The teaching of Fashion Originator's Guild was that the social desireability of the end or purpose of the boycott could not withdraw if from statutory condemnation." Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 Col. L. Rev. 843, 864-865 (1959).

The same view is expressed by Professor Oppenheim:

> "While it was previously arguable that the Court had preserved a limited area for reasonable collective refusals to deal in exceptional instances; *Klor's* has reduced this prospect to a mirage." Oppenheim, *Selected Antitrust Developments*, 15 A.B.A. Section of Antitrust Law 37, 55 (1959).

The law is clear. Unless the NYSE is immunized from the antitrust laws by reason of its statutory obligations under the Securities Exchange Act, its action in this case

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[13] *United States* v. *First National Pictures, Inc.*, 282 U. S. 44, 53-55 (1930); *Associated Press* v. *United States*, 326 U. S. 1, 17 (1945); *Montague & Co.* v. *Lowry*, 193 U. S. 38, 41-42 (1904); *California League of Independent Insurance Producers* v. *Aetna Casualty & S. Co.*, 179 F. Supp. 65, 66 (N. D. Cal., 1959).

was illegal *per se*. *Fashion Originators' Guild* v. *FTC*, 312 U. S. 457 (1941).

II

The NYSE's Action Was Not Immunized From the Antitrust Laws

The Securities Exchange Act provides no explicit antitrust immunity for actions taken by registered securities exchanges. *United States* v. *Morgan, et al.*, 118 F. Supp. 621, 697 (SDNY, 1953). Under settled principles no such immunity will be implied unless there is a clear repugnancy between the Act and the antitrust laws, and then only *pro tanto* to the extent of the repugnancy. *California* v. *Federal Power Commission*, 369 U. S. 482, 485-486 (1962); *Milk Producers Assn.* v. *United States*, 362 U. S. 458, 469-470 (1960); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 457 (1945); *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939). In this case, no such repugnancy exists.

Before turning to specifically consider the problem, and because the NYSE is charged with certain obligations and responsibilities under the Securities Exchange Act of 1934, it is necessary to consider first the nature of the regulatory role assigned the NYSE in either the "exchange" or "over-the-counter" markets or both.

A. The Exchange Market

Section 6(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78f(b), requires a registered securities exchange to make and enforce rules for the discipline of its members for conduct inconsistent with "just and equitable principles of trade" and the wilful violation of any provisions of the Act or any rule or regulation adopted thereunder. *Baird* v. *Franklin*, 141 F. 2d 238, 244 (2 Cir., 1944), certiorari denied, 323 U. S. 737 (1944). At the same time

the Exchange is authorized by section 6(c) of the Act, 15 U. S. C. § 78f(c), to adopt any rule not inconsistent with the Act, the SEC's rules and regulations thereunder, and the applicable laws of the state in which it is located. *Exchange Buffet Corp.* v. *New York Stock Exchange,* 244 F. 2d 507 (2 Cir., 1957). Congress proceeded on the theory that exchanges are public institutions, not private clubs, and did not place upon the SEC "the entire burden of policing the Exchange markets, but relie[d] in some measure upon the Exchanges themselves to assure high standards of trade and to discipline members who violate those standards." *Avery* v. *Moffatt,* 187 Misc. 576, 55 N. Y. S. 2d 215, 227-228 (1945).

In this area, *i.e.,* the exchange market, cooperative policing activities between the SEC and the Exchange are limited to Exchange *members* or *member firms.* In other words, while the Securities Exchange Act of 1934 in no way affected the right of the exchanges to discipline their own members, even for derelictions in over-the-counter transactions, power to prevent abuses by non-members was vested in the SEC. Thus, whenever an exchange's facilities are or are about to be used by a non-member in violation of the Act, not only is the SEC empowered to act immediately to enjoin such violation under section 21(e), 15 U. S. C. § 78u(e), but, in addition, it is empowered under section 19(a)(3) to suspend or expel from an exchange any *member* who (with knowledge of the violation) effected the non-member's transaction. 15 U. S. C. § 78s(a)(3). 2 Loss, *Securities Regulation,* 1172 (1961).

B. The "Over-the-Counter" Market

The "over-the-counter" securities market has been defined as embracing every stock transaction other than on a national securities exchange. *Speed* v. *Trans-America Corp.,* 99 F. Supp. 808, 830 (D. C. Del., 1951); 2 Loss, *Securities Regulation,* 1277 (1961). Here, as in the ex-

change markets, cooperative policing activities between the SEC and the Exchange are limited to Exchange *members* or *member-firms*. Congress did not authorize the exchanges to share responsibility with the SEC for policing the over-the-counter activities of non-members.

In the Securities Exchange Act of 1934, Congress attempted to solve the problem of "policing" the over-the-counter securities markets by (1) requiring brokers and dealers in over-the-counter securities to register with the SEC in accordance with the provisions of sections 15(a) and (b) of the Act, 15 U. S. C. § 78o(a), (b); (2) establishing an SEC broker-dealer inspection program pursuant to section 17(a) of the Act, 15 U. S. C. § 78q(a); and (3) adopting the anti-fraud provisions set forth in sections 10(b) and 15(c)(1) of the Act, 15 U. S. C. §§ 78j(b), 78o (c)(1).

While the provisions on registration, inspection, and prevention and punishment of fraudulent practices furnished a foundation for an adequate regulatory solution, Congress believed that the job was incomplete. Supplementary regulation on an ethical plane was required "in order to protect the investor and the honest dealer alike from dishonest and unfair practices by the submarginal element in the industry," and "to cope with those methods of doing business which, while technically outside the area of definite illegality, [were] nevertheless unfair both to customer and to decent competitor, and [were] seriously damaging to the mechanism of the free and open market." *S. Rep. No. 1455*, 75th Cong., 3d Sess., 3 (1938); *H. R. Rep. No. 2307*, 75th Cong., 3d Sess., 4 (1938). And since regulation of an industry's *ethics* meant a substantial amount of *self*-regulation, Congress adopted this philosophy when it enacted the Maloney Act in 1938. 2 Loss, *Securities Regulation*, 1361 (1961).

C. Pattern of Federal Regulation—Over-the-Counter Markets

Apart from the Act's inspection and anti-fraud provisions, the SEC is authorized to deny or revoke (after notice and hearing) the registration of any broker or dealer (1) for any false or misleading statement of any material fact in a registration application; or (2) for conviction (at any time within the ten years preceding the filing of the application) of a felony or misdemeanor involving the purchase or sale of any security; or (3) who is subject to a court order enjoining him from engaging in any conduct or practice in connection with the purchase or sale of any security; or (4) who has wilfully violated any provision of the Securities Act of 1933 or the Securities Exchange Act of 1934 or any SEC rule or regulation thereunder. 15 U. S. C. § 78o(b). In addition, section 15-A was adopted in 1938 to supplement the SEC's administration and enforcement of the Act's inspection, anti-fraud, and registration provisions.

Section 15-A provides that no broker or dealer can be admitted into membership of a registered association of securities dealers if (a) such broker or dealer was suspended or expelled from a national securities exchange for conduct inconsistent with just and equitable principles of trade or (b) the SEC has revoked his registration. 15 U. S. C. § 78o-3(b)(4). And no broker or dealer can remain a member of such association if, after notice and hearing (and following review by the SEC), the association finds him guilty of conduct inconsistent with just and equitable principles of trade or in violation of the association's rules. 15 U. S. C. §§ 78o-3(b)(9), (g), (h)(1), (h)(2). This is important because section 15-A(i) of the Act, 15 U. S. C. § 78o-3(i), provides:

> "The rules of a registered securities association may provide that no member thereof shall deal with any non-member broker or dealer * * * except at the

same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public." [14]

In *National Association of Securities Dealers, Inc.*, 19 SEC 424, 441 (1945) the Commission said that this provision makes it "virtually impossible for a dealer who is not a member of the NASD to participate in a distribution of important size" (underwriting). And, "entirely apart from underwriting, members may give each other the benefit of special discounts in ordinary trade which they do not give to the general public and hence may not give to non-member brokers and dealers." 2 Loss, *Securities Regulation*, 1370 (1961).

Since any association adopting such a rule would have violated the Sherman Act, Congress provided an immunity. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 227, ftn. 60 (1940); *International Association of Machinists* v. *Street*, 367 U. S. 740, 809, ftn. 16 (1961).[15] That immunity, as set forth in section 15-A(n) of the Act, 15 U. S. C. § 78o-3(n), exempts from the antitrust laws those rules of a registered association of securities dealers (and only such an association) which discriminate against non-members or those ineligible for membership. *United States* v. *Morgan, et al.*, 118 F. Supp. 621, 697 (S. D. N. Y., 1953); *National Association of Securities Dealers, Inc.*, 19 SEC 424 (1945); 2 Loss, *Securities Regulation*, 1370 (1961).

The foregoing demonstrates that, insofar as "over-the-counter" activities by non-exchange members are concerned, regulation was to be conducted in the first instance by the SEC through the broker-dealer registration pro-

[14] For a full description of the congressional purpose in enacting the provision, see *S. Rep. No. 1455*, 75th Cong., 3d Sess., 8-9 (1938); *H. R. Rep. No. 2307*, 75th Cong., 3d Sess., 9 (1938); 2 Loss, *Securities Regulation*, 1369-1370 (1961).

[15] Frankfurter, J., dissenting.

visions of the Securities Exchange Act of 1934. This was to be supplemented by the NASD's program of self-regulation in the field of business ethics (*i.e.*, discipline for conduct inconsistent with just and equitable principles of trade). The economic sanctions which could be imposed by this supplementary method were believed so serious and yet so vital to any effective scheme of self-regulation that a specific exemption from the antitrust laws was provided—an exemption which was to be effective solely in this narrow area. Obviously, this pattern of "over-the-counter" regulation permits, as to non-members, no intrusion by the New York Stock Exchange, nor any antitrust exemption to the NYSE under the doctrine of "supersession to an extent." See *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 193 F. 2d 230, 235 (C. A. D. C.), aff'd 343 U. S. 414 (1952).

D. Supersession to an Extent

Section 6(b) of the Act, which *requires* the NYSE to make and enforce rules for the discipline of its members for conduct "inconsistent with just and equitable principles of trade" and the wilful violation of any provisions of the Act, provides no antitrust immunity for exchange action directed, not against the derelictions of members, but against non-members who maintain private wire connections with members. Cf. *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. 2d 673, 687 (8 Cir., 1926). And, in the instant case, the NYSE's action was directed, not against illegal or unethical member conduct, but against non-members believed to be "untrustworthy persons of * * * doubtful character". (R. 229). The holding of *Baird* v. *Franklin*, 141 F. 2d 238 (2 Cir., 1944), is that an exchange is required to enforce its rules against *members* (*id.*, at p. 244), *not* that the NYSE is subject to liability for failure to enforce a rule which, as to *non-members*, is illegal under the Sherman Act. See *Pirnie Simons & Co.* v. *Whitney*, 144 Misc. 812, 259 N. Y. S. 193, 211-213 (1932). "It would

be illegal for [exchange members] to agree not to transact any business with him at all, for no other reason than that they did not like him or his business, and it would be illegal for them to combine not to buy or sell for him, while he was a member of any particular club * * * or political organization * * *." *Heim* v. *Stock Exchange*, 64 Misc. 529, 118 N. Y. S. 591, 593 (1909).

Section 6(c) of the Act, which *permits* the NYSE to adopt and enforce any rule not inconsistent with the Act and the SEC's rules and regulations thereunder, must be read together with Section 19(b). That section authorizes the SEC to request an exchange to make "specified changes in its rules and practices." If, after notice and hearing upon the exchange's refusal, the SEC finds such changes to be necessary to protect investors "or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange," it may supplement or alter the exchange's rules "in respect of such matters as * * * (8) *the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange* * * *." 15 U. S. C. § 78s(b) (emphasis supplied).

The majority below held that the NYSE's "wire connection rule",[16] as applied, was immunized from the anti-trust laws because "it is reasonably to be presumed that [that rule has] the approval of the Commission since it has not taken the action which it is empowered to take to bring about [its] amendment". (R. 264). This holding is clearly wrong. Section 19(b), which gives the SEC power "to insure fair administration of [the] exchange" with respect to Exchange rules concerning "(8) *the reporting of transactions on the exchange* and upon tickers maintained by or with the consent of the exchange * * *," 15 U. S. C. § 78s(b)(8), does not include private wire connections between members and non-members utilized to communicate

[16] *Op. cit., supra,* ftn. 11.

with respect to transactions in over-the-counter markets. A private wire connection is to the over-the-counter market what the "ticker" is to the exchange market. 2 Loss, *Securities Regulation*, 1278-1283 (1961). Moreover, as the United States makes clear, the SEC did not approve "the particular exchange rules here involved" and, in any event, the SEC "has no authority to review action taken by an exchange in applying its rules."[17]

The District Court held that the provisions of the Securities Exchange Act "requiring an Exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the antitrust laws" (R. 222). Judge Bryan said:

> "The SEC does not give affirmative sanction to the rules filed by national exchanges. Its grant of registration to an exchange goes no farther than to indicate that the rules filed meet the minimum standards required of exchanges by the statute so as to insure that its members will comply with the provisions of the law and shall not conduct themselves in a manner inconsistent with just and equitable principles of trade. Moreover, and equally important, there is no procedure by which a non-member aggrieved by action of the Exchange purportedly taken under its filed rules, may resort to administrative proceedings before the SEC to redress his grievances or to attack the rules themselves, either at the time of filing or thereafter. * * * If the theory of the Exchange were correct these plaintiffs would not only have no remedy before the Commission but would find themselves barred from remedy in the courts also on the mere say-so of a private association. This is in marked contrast to what occurs in a recognized closed regulatory system." (R. 222).

This holding was clearly right. *E.g.*, *United States* v. *Radio Corporation of America*, 358 U. S. 334, 346 (1959); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456-457 (1945); *United States* v. *Borden Co.*, 308 U. S. 188, 197-198 (1939).

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[17] Brief for United States in support of petition for writ of certiorari, p. 12.

III

Congress Provided No Immunity for Arbitrary Exchange Action

We have shown that Section 6(b) of the Act, which *requires* the NYSE to make and enforce rules for the discipline of its *members,* provides no antitrust immunity for exchange action directed not against illegal or unethical member conduct, but against non-members who maintain private wire connections with members. The District Court correctly held that so long as Exchange "members do not indulge in conduct which is illegal or inconsistent with just and equitable principles of trade [the NYSE], has neither the power nor the authority to determine with whom its members may or may not deal * * *." (R. 223-224).

Assuming, *arguendo,* that the District Court was incorrect, and that a concerted refusal to deal with "untrustworthy" non-members is immune from the antitrust laws, it is clear, nonetheless, that Congress provided no immunity for arbitrary or unreasonable Exchange action. Congress, which could not itself deny petitioners "due process", did not empower the NYSE to do so. In fact, Congress was scrupulous in providing administrative "due process" to the broker-dealers whom it subjected to registration revocation or other disciplinary proceedings under the Securities Exchange Act. See *e.g.,* Sections 15(b), 15-A(b)(9), (g) and (h) of the Act, 15 U. S. C. §§ 78o(b), 78o-3(b)(9), (g) and (h).

The District Court found that the NYSE had "acted arbitrarily and unreasonably in directing that [petitioners'] wire connections be severed" (R. 233). The Court of Appeals did not disturb this finding. It said: "Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made

against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary" (R. 267). It could hardly have been otherwise. The NYSE's Constitution and Rules, which provide elaborate procedural safeguards for members (R. 195-196), provide no procedural safeguards for nonmembers (R. 74).

In *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), this Court held that Certificate No. 44, which granted railroad rate bureaus an explicit immunity from the antitrust laws, did "not sanction the use of coercion * * *, [nor] authorize any combination to discriminate against a region in the establishment of rates" (*id.*, at p. 459, ftn. 7). In *Milk Producers Assn.* v. *United States*, 362 U. S. 458 (1960), this Court later held that section 6 of the Clayton Act, 15 U. S. C. § 17, which exempts agricultural organizations from the antitrust laws, did not grant such organizations immunity "to engage in predatory trade practices at will". *Id.*, at page 406. In this case, despite the absence of an explicit exemption, the majority below, fearing that liability under the Sherman Act, but not under some other law,[18] "would go far toward defeating the statutory policy of self-regulation" (R. 266), held that Exchange action, even if arbitrary, was impliedly immune.

"Immunity from the antitrust laws is not [so] lightly implied." *California* v. *Federal Power Commission*, 369 U. S. 482, 485 (1962).

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[18] The majority below held that "if the action of the Exchange was arbitrary or unreasonable", petitioners were not without some other, but unspecified, remedy (R. 267-268).

CONCLUSION

By reason of the foregoing, the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

Statutory Provisions Involved

Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1:

> "Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, is declared to be illegal * * *."

Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * *."

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the anti-trust laws * * *, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon * * * a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue * * *."

Section 6 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U. S. C. § 78f:

> "(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

"(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;

"(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

"(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as 'the rules of the exchange'; and

"(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

"(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

"(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

"(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Com-

mission shall cause such exchange to be registered as a national securities exchange.

"(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

"(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration."

Section 19(b) of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U. S. C. § 78s(b):

"(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration

or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."